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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 990

THE UNITED STATES, PETITIONER
v.
NUNNALLY INVESTMENT COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled cause on January 27, 1941.

OPINION BELOW

The opinion of the court below (R. 20–32) is reported in 36 F. Supp. 332.

JURISDICTION

The judgment of the Court of Claims was entered January 27, 1941. (R. 32.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

In 1929 the taxpayer obtained a judgment in the District Court against the Collector of Internal Revenue, awarding it a refund of income taxes for the year 1920. May it thereafter bring another suit in the Court of Claims to obtain an additional refund of income taxes for the same year?

STATUTES INVOLVED

Revised Statutes.

> SEC. 989. When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury. (U. S. C., Title 28, Sec. 842.)

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 1128.
>
> * * * * *
>
> (b) Section 3210 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3210. (a) Except as provided in subdivision (b) the gross amount of all taxes and revenues received under the provisions of this Act, and collections of whatever nature received or collected by authority of any internal-revenue law, shall be paid daily into the Treasury of the United States under instructions of the Secretary of the Treasury as internal-revenue collections, by the officer receiving or collecting the same, without any abatement or deduction on account of salary, compensation, fees, costs, charges, expenses, or claims of any description. A certificate of such payment, stating the name of the depositor and the specific account on which the deposit was made, signed by the treasurer, assistant treasurer, designated depositary, or proper officer of a deposit bank, shall be transmitted to the Commissioner of Internal Revenue.

* * * * *

(U. S. C., Title 26, Sec. 1761.)

STATEMENT

The special findings of fact of the Court of Claims (R. 13–19) may be summarized as follows:

The respondent is a Delaware corporation, the successor, since 1935, of a Georgia corporation of the same name. The Georgia corporation, formerly the Nunnally Company, is hereinafter referred to as the taxpayer. (R. 13.)

On January 2, 1920, the taxpayer sold all its business and assets to the Nunnally Company of Delaware for $3,000,000 cash and the assumption

of certain of the taxpayer's liabilities, including federal taxes for the years 1917, 1918 and 1919. These taxes amounted to $209,958.91, of which $170,219.41 was paid by the purchaser in the year 1920, and the remainder of $39,739.50 was paid in 1921 and 1922. (R. 14.)

Taxpayer filed an income tax return for the year 1920, reporting a net profit of $379,384.22 from the sale of its assets, but showing no tax liability as a result of certain offsetting items. (R. 14–15.) Thereafter the Commissioner of Internal Revenue determined a deficiency for the year 1920 in the amount of $493,817.95. In determining the deficiency the Commissioner employed a lower basis in computing gain upon sale of the taxpayer's assets, and he used $3,209,958.91 as the sales price, representing the cash consideration of $3,000,000 plus $209,985.91 of the taxpayer's tax liability for earlier years which the vendee discharged. The profit on sale was thus computed to be $1,637,467.80. (R. 8–11, 15.)

The additional tax assessed, together with interest of $16,113.34 making a total amount of $509,-931.29, was demanded of the taxpayer by the Collector of Internal Revenue for the District of Georgia, and was paid to the Collector on September 21, 1926. (R. 15.)

On April 22, 1927, the taxpayer filed with the Collector a claim for refund for the full amount of taxes and interest paid alleging that the Com-

missioner's statement of income was erroneous by reason of his understatement of the basis of the assets sold. No other ground for refund was stated in the claim. More than six months after the filing of the claim, the taxpayer filed suit against the Collector in the United States District Court for the Northern District of Georgia, denying that any of the taxes assessed against it were due and raising no issue except the basis for determining profit of the assets sold on January 2, 1920. (R. 15.)

The case was tried on stipulations and oral testimony directed to the issue of the basis of the assets sold. The jury rendered a special verdict determining the value as of March 1, 1913, of the entire business and property of the Nunnally Company and of certain leases. Thereafter the Collector filed a motion for a new trial. (R. 16.)

Upon order of the court, the parties submitted computations of the amount of the judgment to be based on the verdict, the taxpayer submitting two computations and the Collector one. In all of these computations the sales price used was the same, i. e., $3,209,958.91, but there was a divergence in other figures making a difference in the computations of the amount of the overpayment of tax and interest. (R. 16–17.)

In the light of the dispute between the parties as to the proper valuation of the assets and of the defendant's [the Collector's] motion for a new trial, the parties on June 27, 1929, entered into the

following stipulation for judgment and no appeal (R. 17–18):

> Subject to the approval of the Attorney General of the United States, to be acted upon within thirty days from this date, it is hereby stipulated by and between the plaintiff, by its attorneys, Clifford L. Anderson, Granger Hansell, and H. Brand, and defendant, by C. P. Goree, Assistant U. S. Attorney, and Elden MacFarland, Special Attorney, Bureau of Internal Revenue, that judgment be entered in the above-stated cause in favor of the plaintiff and against the defendant in the principal sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars, together with interest on said sum from September 21, 1926, according to law, together with lawful costs of court.
>
> Said judgment having been entered, it is stipulated that neither side shall appeal therefrom.
>
> It is further stipulated that if the Attorney General does not take favorable action on this stipulation within the period of thirty days, as above set out, the stipulation shall be of no force and effect and the parties shall be restored to the same status which they occupied before the stipulation was entered into.

On the basis of this stipulation for judgment, judgment was entered on July 6, 1929, for $250,000 and interest and costs of suit, and a certificate of probable cause was granted. Thereafter a certificate of overassessment was issued to the taxpayer

and the total amount of $295,265.33 shown thereon was paid to it on or about September 29, 1929. (R. 18.)

Thereafter, on September 13, 1930, the taxpayer filed a claim for refund of $200,000 income and profits taxes for 1920. It sought refund on the ground that the sales price of the assets should not have been as high as $3,209,958.91, because some of the taxpayer's pre-1920 taxes which the vendee paid and which were included in that purchase price, were in fact not paid until 1921 and 1922 and therefore could be income to the taxpayer only in the latter years rather than in 1920. The claim also sought refund on other grounds that were later abandoned. (R. 18–19.)

Upon rejection of this claim, suit was instituted in the Court of Claims on March 18, 1933.

The Court of Claims gave judgment for the taxpayer holding that the taxes assumed by the purchaser, but not paid until after 1920, did not constitute taxable income to the respondent in 1920; and that the judgment against the Collector in the District Court was not *res judicata* in this suit against the United States. Judge Whitaker dissented. (R. 20, 26.)

SPECIFICATION OF ERROR TO BE URGED

The Court of Claims erred in permitting a suit against the United States to recover taxes for the year 1920 notwithstanding a prior judgment against a Collector of Internal Revenue with respect to the same tax for the same year.

REASONS FOR GRANTING THE WRIT

In 1929 the taxpayer obtained a judgment in the District Court against the Collector of Internal Revenue in the amount of $295,265.33, as a refund of income taxes for the year 1920. Thereafter, it instituted this suit against the United States in the Court of Claims seeking an additional refund for the same tax year. In permitting the taxpayer to maintain this suit, the decision of the court below deals with a question of great importance in federal tax litigation and is in conflict with principles established by this Court.

1. If the earlier suit had been against the United States, rather than against the Collector, there can be no doubt that the present suit would not be maintainable, whether the result be couched in terms of *res judicata* or estoppel by judgment. The contrary result of the court below turns solely upon the fact that the earlier suit here was against the Collector and rests upon *Sage* v. *United States,* 250 U. S. 33, where a suit against a Collector was described as "personal" in nature.[1]

[1] The discussion in the *Sage* opinion as to the nature of the suit against the Collector has been regarded as dictum, since the result in that case was supportable by certain specific legislation dealing with the particular legacy taxes there involved. See *Second Nat. Bank of Saginaw* v. *Woodworth*, 54 F. (2d) 672, 673 (E. D. Mich.); *Cudahy Packing Co.* v. *Harrison*, 18 F. Supp. 250, 254 (N. D. Ill.), appeal dismissed, 102 F. (2d) 981 (C. C. A. 7th); *Sage* v. *United States*, *supra*, at p. 38. See also Griswold, *Res Judicata in Federal Tax Cases*, 46 Yale L. J. 1320, 1341–1342.

However, whatever basis there may have been for the *Sage* decision was removed by this Court's subsequent decision in *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373. The latter case involved the provisions of the Revenue Act of 1926 which dispensed with the necessity of payment under protest as a condition to suits for refund of taxes. It was argued that it was unconstitutional to eliminate that condition as to suits against the Collector since such suits were "personal" in nature and that there would be absence of due process to deprive the Collector of such rights, particularly as to taxes already paid before enactment of the new provisions. This Court, however, in sustaining the provisions, pointed out that a suit against the Collector was in reality a suit against the Government (pp. 382–383):

> A suit against a Collector who has collected a tax in the fulfilment of a ministerial duty is today an anomalous relic of bygone modes of thought. He is not suable as a trespasser, nor is he to pay out of his own purse. He is made a defendant because the statute has said for many years that such a remedy shall exist, though he has been guilty of no wrong, and though another is to pay. * * * There may have been utility in such procedural devices in days when the Government was not suable as freely as now. * * * They have little utility today, at all events where the complaint against the officer shows upon its face that in the proc-

> ess of collecting he was acting in the line of duty, and that in the line of duty he has turned the money over. In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court.

In holding that the present suit is maintainable since the earlier suit against the Collector was "personal", the decision of the court below is in direct conflict with the principles thus laid down in the *Moore Ice Cream Co.* decision. Cf. *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 401–404;[2] *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337.

Moreover, some of the lower federal courts as well as commentators have regarded the *Sage* case as inconsistent with the *Moore Ice Cream Co.* decision or have otherwise sharply criticized the result. See *Western Maryland Ry. Co.* v. *United States,* 23 F. Supp. 554, 558–560 (D. Md.); *Second Nat. Bank of Saginaw* v. *Woodworth,* 66 F. (2d)

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[2] Although it is true that the *Sage* case was cited in the *Sunshine Coal* opinion as well as in *Tait* v. *Western Md. Ry. Co.*, 289 U. S. 620, nevertheless neither of those cases turned upon the "personal" nature of the action against the Collector. Prior to the *Moore Ice Cream Co.* decision the *Sage* case had been applied in *Bankers Coal Co.* v. *Burnet*, 287 U. S. 308. But the question in the *Bankers Coal* case did not involve splitting a single cause of action or relitigating the identical tax liability; in that case the question was whether an issue litigated as to earlier years in a suit against a collector could be litigated as to *later* years in another proceeding. Although the distinction there drawn in reliance upon the *Sage* case is perhaps undesirable, the question is nevertheless different from the one here involved.

170, 171 (C. C. A. 6th); Griswold, *Res Judicata in Federal Tax Cases,* 46 Yale L. J. 1320, 1342–1343; Paul, *Selected Studies in Federal Taxation* (Second Series), p. 125.

In view of the probable conflict in principle with the *Moore Ice Cream Co.* decision and in view of the uncertainty as to the present scope of the *Sage* decision, it is highly important to the orderly conduct of the Government's tax litigation that the question be authoritatively settled by this Court.

2. But even if a suit against a Collector may be said to be "personal" in some circumstances, it certainly was not such in this case. The Collector in the suit in the District Court was clearly acting as an agent of the Government and not in his personal capacity. The tax sought to be recovered was collected by him in accordance with the instructions of his superior officer, the Commissioner of Internal Revenue. He was under an immediate duty to pay such amount into the Treasury of the United States,[3] he was represented in the suit by the District Attorney, and the final settlement was subject to the approval of the Attorney General. In such circumstances, he was entitled to a certificate of probable cause as a matter of right[4] and it was not in the discretionary power of the District Judge to deny its issuance.

In *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, this Court recently held that where the issue in

[3] Revised Statutes, Section 3210, *supra.*

[4] Revised Statutes, Section 989, *supra.*

separate suits is the same, the fact that the parties are not precisely identical is not necessarily fatal. It was pointed out in that case that there is privity between officers of the Government and that the crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interest in a final adjudication of the issue in controversy. It therefore held that a judgment in a suit against the Bituminous Coal Commission was *res judicata* in a later suit against a Collector.

The decision of the court below is thus in conflict in principle with the decision in the *Sunshine Coal Co.* case.

3. The decision below is in conflict with the well established principle that a single cause of action may not be split. In *Stark* v. *Starr,* 94 U. S. 477, this Court pointed out that a litigant (p. 485):

> is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible. * * *

See also *United States* v. *California & Ore. Land Co.,* 192 U. S. 355, 358. And the claim that the taxes for a single year have been overpaid constitutes a single cause of action. *International Curtis Marine Turbine Co.* v. *United States,* 56 F. (2d) 708 (C. Cls.); *American Woolen Co.* v. *United*

States, 18 F. Supp. 783 (C. Cls.), certiorari denied, 304 U. S. 581; cf. *Guettel* v. *United States,* 95 F. (2d) 229 (C. C. A. 8th), certiorari denied, 305 U. S. 603. The suit against the Collector drew in question every item which entered into the computation of the tax. *Lewis* v. *Reynolds,* 284 U. S. 281, 599.

A taxpayer may sue either the Collector or the United States, but he may not recover from both. While it is true that a taxpayer has two remedies, it must be evident that they are alternative remedies and not cumulative remedies. Once an election has been made and a judgment secured, the tax liability for that year is fixed and determined. The amount of the recovery due the taxpayer is likewise fixed and determined, and we submit there is no right to institute another action to recover an additional amount.

The rule for which we contend has been specifically enacted into law with respect to Board of Tax Appeals cases. Once the Board has determined the amount of tax, it is provided by Section 284 (d) of the Revenue Act of 1926 that, with certain exceptions, "* * * no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court * * *." Thus a final decision by the Board of Tax Appeals ends all litigation with respect to the tax liability for the partic-

ular year involved. We think that this statute is merely a recognition of the rule generally followed that a single cause of action may not be the subject of more than one suit. In any event, no distinction should be made between taxpayers who litigate in the Board of Tax Appeals and those who sue in the courts. In each case the taxpayer has a single cause of action for any one year and the fact that he has alternative remedies should not be made the excuse for multiple suits. Cf. Government's petition for certiorari in *United States* v. *Kales,* No. 826, 1940 Term.

CONCLUSION

It is therefore respectfully requested that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Acting Solicitor General.

APRIL 1941.

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